Datuk (Datu) Amir Kahar bin Tun Haji Mustapha v Tun Mohd Said bin Keruak & Ors

HIGH COURT (KOTA KINABALU) — ORIGINATING SUMMONS NO K24–63 OF 1994
ABDUL KADIR SULAIMAN J
10 OCTOBER 1994

Civil Procedure *— Originating summons — Striking out — Whether affidavit in support necessary — Whether application must be made before action is set down for trial — Rules of the High Court 1980 O 18 r 19(1), O 28*

Civil Procedure *— Originating summons — Striking out — No reasonable cause of action, frivolous, vexatious and abuse of process of court — Non-justiciable issue — Whether court can consider if conditions precedent to exercise of discretion conferred by Sabah State Constitution fulfilled — Rules of the High Court 1980 O 18 r 19(1) — Sabah State Constitution art 7*

Constitutional Law *— Executive — Appointment of Chief Minister and Cabinet — Exercise of discretion of Yang di-Pertua Negeri Sabah — Whether non-justiciable — Sabah State Constitution arts 6 & 7*

Statutory Interpretation *— Aids to construction — Constitutional convention*

The plaintiff filed an originating summons challenging the appointment by the first defendant of the second defendant as Chief Minister of Sabah and the third to ninth defendants as members of the Cabinet following the resignation of Datuk Joseph Pairin Kitingan ('Pairin') on 17 March 1994 as Chief Minister of Sabah. The plaintiff alleged that the appointments were unconstitutional, ultra vires and invalid when he and the other members of Pairin's Cabinet had not tendered their resignations nor had their appointments been revoked by the first defendant. The defendants applied to strike out the plaintiff's originating summons under O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 and under the court's inherent jurisdiction, mainly on the ground that the issue was non-justiciable. The plaintiff questioned the propriety of the defendants' affidavit in support of its O 18 application as it referred to the defendants' own affidavits-in-reply to the plaintiff's application as the basis of their application, when those affidavits were meant for use at the trial; and also objected to the application on the ground that it had been filed after the court had set the matter down for trial.

Held, dismissing the defendants' application:

(1) Order 18 r 19 does not require any affidavit in support of the application, unlike O 14. In the absence of any express requirement of an affidavit to support the application in O 18 r 19, the affidavit is not mandatory. In the circumstances, the defendants' affidavit was of no consequence.

(2) In a writ action, a striking out application must be refused after the action has been set down for trial. However, in the case of originating summons procedure, such a rigid rule cannot be applied having regard to the short time during which the application has to be made, ie the minimum four clear days' notice of an appointment for the attendance of the parties before the court for the hearing of the summons. Therefore, the filing of the application by the defendants after the hearing of the action was not fatal.

(3) The matters contained in the plaintiff's application did not all concern the issue of the exercise of the Yang di-Pertua Negeri Sabah's discretion under the Sabah Constitution. Furthermore, the court must consider whether there are conditions to be satisfied before any discretion can be exercised. Only when the conditions are satisfied will the court no longer have jurisdiction to enquire as to how and what factors were taken into consideration in arriving at that decision.

(4) There were triable issues involving the interpretation of various provisions of the Sabah Constitution, particularly arts 6 and 7 thereof, which were clearly within the jurisdiction of the court. Therefore, the matter was not that plain and obvious to invoke the court's discretion to summarily strike out the summons.

Obiter:

(1) Even if an affidavit was required under O 18 r 19, then by O 41 r 5(2), an affidavit sworn for the purpose of interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof. In that light, the defendants' affidavit in support was not defective because the deponent had deposed that he verily believed the plaintiff's originating summons disclosed no reasonable cause of action and/or was scandalous, frivolous, vexatious and/or was an abuse of the process of court and had specified the order sought, ie the striking out of the plaintiff's originating summons.

(2) Constitutional convention comes in aid of the construction and interpretation of constitutional provisions but cannot override the express provisions of, in this case, the Sabah Constitution.

[Bahasa Malaysia summary

Plaintif telah memfailkan suatu saman pemula untuk mencabar perlantikan yang dibuat oleh defendan pertama yang melantik defendan kedua sebagai Ketua Menteri Sabah dan defendan ketiga ke kesembilan sebagai ahli-ahli Kabinet berikutan perletakan jawatan Datuk Joseph Pairin Kitingan ('Pairin') pada 17 Mac 1994 sebagai Ketua Menteri Sabah. Plaintif mengata bahawa perlantikan tersebut tidak berperlembagaan, ultra vires dan tidak sah kerana beliau dan

ahli-ahli lain Kabinet yang diketuai oleh Pairin tidak menyerahkan perletakan jawatan mereka dan perlantikan mereka juga tidak dibatalkan oleh defendan pertama. Defendan telah memohon untuk membatalkan saman pemula plaintif di bawah A 18 k 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 dan di bawah bidang kuasa sedia ada mahkamah, terutamanya atas dasar bahawa isu itu tidak boleh diadili. Plaintif telah mempersoalkan kesesuaian afidavit defendan yang menyokong permohonan A 18 mereka kerana ia merujuk kepada afidavit jawapan defendan sendiri yang menjawab permohonan plaintif sebagai dasar permohonan mereka, manakala afidavit tersebut sepatutnya digunakan pada perbicaraan; dan juga membuat bantahan terhadap permohonan itu atas dasar bahawa ia telah difailkan selepas mahkamah menetapkan perkara itu untuk perbicaraan.

Diputuskan, menolak permohonan defendan:

(1) Aturan 18 k 19 tidak memerlukan sebarang afidavit untuk menyokong permohonan itu, tidak seperti A 14. Dengan tiadanya sebarang keperluan nyata untuk suatu afidavit yang menyokong permohonan itu di dalam A 18 k 19, afidavit itu bukan mandatori. Di dalam keadaan sedemikian, afidavit defendan itu tidak penting.

(2) Di dalam suatu tindakan writ, suatu permohonan pembatalan mesti ditolak selepas tindakan itu telah ditetapkan untuk perbicaraan. Bagaimanapun, di dalam keadaan prosedur saman pemula, sesuatu rukun yang setegar itu tidak boleh dipakai memandangkan tempoh masa yang singkat untuk membuat permohonan itu, iaitu notis minimum empat hari genap mengenai temujanji untuk kehadiran semua pihak di hadapan mahkamah untuk pendengaran saman itu. Oleh itu, permohonan yang difailkan oleh defendan selepas pendengaran tindakan itu tidak terjejas.

(3) Perkara-perkara yang terkandung di dalam permohonan plaintif tidak semuanya berkenaan dengan isu penggunaan budi bicara Yang di-Pertua Negeri Sabah di bawah Perlembagaan Negeri Sabah. Lebih-lebih lagi, mahkamah mesti mempertimbangkan sama ada terdapat syarat-syarat untuk dipenuhi sebelum budi bicara itu boleh digunakan. Hanya apabila syarat itu dipenuhi baharulah mahkamah tidak akan mempunyai budi bicara untuk bertanya bagaimana dan faktor apa yang dipertimbangkan apabila membuat keputusan tersebut.

(4) Terdapat isu yang perlu dibicara yang melibatkan pentafsiran beberapa peruntukan Perlembagaan Negeri Sabah, terutamanya perkara 6 dan 7, yang jelas terletak di dalam bidang kuasa mahkamah. Oleh yang demikian, perkara itu tidak begitu jelas dan nyata untuk menimbulkan budi bicara mahkamah untuk terus membatalkan saman itu.

Obiter:

(1) Meskipun sesuatu afidavit diperlukan di bawah A 18 k 19, mengikut A 41 k 5(2), sesuatu afidavit yang diikrarkan bagi maksud prosiding interlokutori boleh mengandungi pernyataan mengenai maklumat atau kepercayaan dengan punca dan alasannya. Dengan demikian, afidavit sokongan defendan tidak tercacat kerana deponen itu telah mendepos bahawa beliau sesungguhnya percaya saman pemula plaintif tidak mendedahkan suatu kausa tindakan yang munasabah dan/atau adalah mengaibkan, remeh dan menyusahkan dan/atau adalah suatu penyalahgunaan proses mahkamah dan telah menyatakan dengan terang perintah yang dipohon itu, iaitu pembatalan saman pemula plaintif.

(2) Konvensyen perlembagaan menolong dalam pentafsiran dan interpretasi peruntukan perlembagaan tetapi tidak boleh mengatasi peruntukan nyata, di dalam kes ini, Perlembagaan Negeri Sabah.]

Notes

For a case on striking out an originating summons, see 2 *Mallal's Digest* (4th Ed) para 1560.

For a case on executive powers, see 3 *Mallal's Digest* (4th Ed) para 828.

For cases on statutory interpretation, see 11 *Mallal's Digest* (4th Ed) paras 1262–1284; [1990] Mallal's Digest 1163; [1991] Mallal's Digest 1903; [1992] Mallal's Digest 1610; [1993] Mallal's Digest 1246–1249.

Cases referred to

Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman [1987] 2 MLJ 633 (distd)

Jamir Hassan v Kang Min [1992] 2 MLJ 46 (distd)

Mahabir Prasad v Prafulla Chandra AIR 1969 Cal 198 (distd)

Tun Datu Hj Mustapha bin Datu Harun v Tun Datuk Hj Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah and Datuk Joseph Pairin Kitingan (No 2) [1986] 2 MLJ 420 (folld)

Legislation referred to

Rules of the High Court 1980 O 14, O 18 r 19(1), O 29 r 1(2), O 32 r 1, O 41 r 5(2), O 49 r 2, O 50 r 3, O 81 r 2(1)

Sabah State Constitution arts 6, 7

YM Raja Aziz Addruse (*Yunof E Maringking* with him) (*Maringking & Co*) for the plaintiff.

Abdul Ghani Patail (Senior Federal Counsel) (*KK Wong* and *Halimah Nawab Khan* with him) for the first, second and fourth to ninth defendants.

Lawrence Chong (*Yong & Chia*) and *V Sukumaran* (*J Ambrose & Co*) for the third defendant.

Cur Adv Vult

Abdul Kadir Sulaiman J: This is the defendants' application by summons-in-chambers to strike out the plaintiff's originating summons praying for various declarations arising out of the resignation of Datuk Joseph Pairin Kitingan ('Pairin') on 17 March 1994 as Chief Minister of Sabah and the appointments by the first defendant of the second defendant as the new Chief Minister and the third to ninth defendants as members of the new Cabinet on the advice of the Chief Minister. The plaintiff challenges the appointment of this new Cabinet as being unconstitutional, ultra vires and invalid when he and the other members of Pairin's Cabinet had not tendered their resignations nor had their appointments been revoked by the first defendant.

The defendants' application is under O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('the RHC') and under the inherent jurisdiction of the court. The application is supported by the affidavit of Wong Kian Kheong affirmed on 7 September 1994. The said affidavit merely refers to various affidavits-in-reply of the defendants filed as replies to the plaintiff's main application in the originating summons. Based on those affidavits-in-reply, the deponent verily believes that the originating summons of the plaintiff discloses no reasonable cause of action against all or any of the defendants, and/or is scandalous, frivolous, vexatious and/or is an abuse of the process of the court. In opposition to this application of the defendants, the plaintiff filed an affidavit in opposition affirmed on 22 September 1994. In the affidavit in opposition of the plaintiff, he questioned the propriety of those affidavits-in-reply referred to by the deponent of the affidavit in support of this application, since those affidavits are meant for the trial/hearing of the originating summons which had been fixed for hearing. So, the immediate issue which calls for a decision is whether the application of the defendant is defective in the light of the nature of the affidavit in support. This application of the defendants is made by way of a summons-in-chambers pursuant to O 32 r 1 of the RHC. According to Form 62, the applicant is required to state the grounds of the application. In this case, the grounds are therein stated as being that the originating summons discloses no reasonable cause of action against all or any of the defendants, which is ground (a) of r 19(1). The other ground is that it is scandalous, frivolous or vexatious, which is ground (b) of r 19(1), and finally, that it is an abuse of the process of the court, which is ground (d) of r 19(1) of O 18 of the RHC. Order 18 r 19 does not spell out the requirement of any affidavit in support of the application. This is different from an application made under O 14 where, by r 2(1) thereof, the application must be made by summons supported by an affidavit. Similarly with an application under O 81, where by r 2(1) thereof, an affidavit is required for the application. Again, an application under O 49 r 2 is required to be supported by an affidavit. Similarly with an application under O 50 r 3, where the application must be supported by an affidavit. To cite yet another form of application is an application under O 29 r 1(2) of the RHC which must be supported by an affidavit, whereas under O 18 r 19, it merely requires an application to be made. There is no requirement in the rule of an affidavit accompanying the application. An application by summons-in-chambers is no doubt an interlocutory proceeding and O 41 r 5(2) mentions an affidavit sworn for the purpose of being used in

interlocutory proceedings. But in the absence of any express requirement of an affidavit to support the application in O 18 r 19, it is my view that for an application under the rule, the affidavit in support of the application is not mandatory. In the circumstances, the affidavit of Wong Kian Kheong in support of this application of the defendants is of no consequence or significance. In any event, if I am wrong in holding that an affidavit is not a prerequisite for an application under O 18 r 19, then according to O 41 r 5(2), an affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof. In that light, the affidavit of Wong Kian Kheong in this case is not defective because after a reference to those affidavits, he deposed that based on the aforesaid affidavits, he verily believes that the originating summons of the plaintiff discloses no reasonable cause of action against all or any of the defendants and/or is scandalous, frivolous, vexatious and/or is an abuse of the process of court. According to the *Supreme Court Practice 1988* at p 313, the application should specify precisely what order is being sought. In this case, the application specifies that the order sought is for the plaintiff's originating summons dated 20 May 1994 be struck out under O 18 rr 19(1) and (3) of the RHC and/or under the inherent jurisdiction of the High Court based on the grounds listed therein which are as stipulated under O 18 r 19(1)(a), (b) and (d) of the RHC. By the application, the defendants pray for the striking out of the whole pleading in the originating summons. In the circumstances, the plaintiff's objection has no merit.

Next, the plaintiff, by his affidavit, opposes the application of the defendants on the ground that since the commencement of the action by him, the defendants have filed a number of affidavits in opposition to his claim. Having taken these further steps in the proceedings, the defendant's application ought not to be allowed. In his submission, the learned counsel for the plaintiff says that the application should not be entertained because this application of the plaintiff was filed after the court had fixed the date of hearing of the plaintiff's originating summons. On the authority of *Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman* [1987] 2 MLJ 633 cited in *Jamir Hassan v Kang Min* [1992] 2 MLJ 46, the counsel says the application must be refused. In reply, the learned counsel for the defendants submits that the cases cited relate to writ actions whereas the matter before the court now is by way of originating summons. In a writ action, various interlocutory stages precede the setting down of a case for hearing and in between this period, the parties would have ample opportunity to scrutinize the pleadings and to consider other available evidence in the meantime before making a decision whether to file such a nature of application. Therefore, it is proper that if the application is made after the action has been set down for trial, the application must be refused. However, in originating summons cases, there was to be no such protracted procedures to follow. On 21 July 1994, the plaintiff was given leave to amend his originating summons. In the amended summons, the second defendant's appointment as the Chief Minister of Sabah was being challenged as well. Because of this substantial change in the character of the action of the

plaintiff, further instructions from the second defendant were to be obtained. In the meantime, the new hearing date has been fixed for 25 July 1994. So, after getting the necessary instructions, this application was immediately sent for filing vide letter dated 7 September 1994. So, he prays that the fixing of the date of hearing of the originating summons of the plaintiff in this case should not be a hindrance in the circumstances and the two cases cited above should be distinguished.

In this case, the trial of the plaintiff's originating summons was originally fixed for hearing on 5 July 1994. However, on that day, the plaintiff applied for an adjournment. The defendants strenuously objected to the application on the ground that they had made all necessary preparations to proceed with the hearing on that day and blamed the plaintiff who had filed the action and not been ready to proceed with the hearing and had asked for costs to be given to them in the event that the court granted the plaintiff's application for adjournment. The court granted the adjournment with costs to the defendants. The court then fixed new hearing dates on 25 and 26 July 1994. On 25 July 1994, the plaintiff again applied for a short adjournment as the leading counsel had a technical problem over the issue of a work permit to him. The defendants had no objection to the application this time and at the same time applied for an adjournment of the hearing on the ground that they had just been served with an amended originating summons. Because of the serious implications of the amendment, fresh instructions from the second defendant were to be sought as to the next course of action to be taken. The court then allowed the adjournment and put the next hearing dates to this session, ie 27 and 28 September 1994. Meanwhile, by a letter dated 7 September, the defendants filed this application to strike out the pleading of the plaintiff. The court fixed the hearing of this application on the same date of the scheduled hearing of the plaintiff's originating summons, ie on 27 September 1994. I am inclined in the circumstances to agree with the submission of the learned counsel for the defendants. In regard to a writ action, the position is clear that notwithstanding the provisions of O 18 r 19(1), which allows an application to strike out the pleading to be made at any stage of the proceedings, yet by authority such an application must be refused after the action has been set down for trial: see *Bank Bumiputra*'s case. However, in the case of originating summons procedure, with a minimum of four clear days' notice after an appointment for the attendance of the parties is made, a date can be fixed requiring the parties to appear for the hearing. Therefore, if the rigid rule applicable to a writ action is to be applied, very seldom can an application of this nature be filed. In this case, the originating summons of the plaintiff was filed on 20 May 1994 and the memorandum of appearance of the first to the ninth defendants was entered on 10 June 1994. The notice of appointment to hear the originating summons in this case was sealed towards the end of June 1994 and the court fixed the date of hearing to be on 6 and 7 July 1994. Thus, if the rule in *Bank Bumiputra*'s case is to be applied, there would not be any room for the defendants to file this application. Furthermore, in this case, the matter is aggravated by the substantial amendment made to the

originating summons on 21 July 1994 and, therefore, instructions from the second defendants were to be obtained. In the circumstances, I would hold that the filing of this application by the defendants on 9 September 1994, after the hearing of the action fixed, is not fatal to them.

Coming now to the application of the defendants. One and a half days were spent hearing the submissions from both sides, mainly from the learned counsel for the defendants. The counsel for the third defendant adopts the submissions of En. Ghani. The submission by En. Ghani is mainly on the issue of the jurisdiction of the court to hear the originating summons of the plaintiff, it being in respect of matters which are non-justiciable. He cited various Indian authorities in support. However, he conceded that those matters concern relevant provisions as contained in the Indian Constitution which generally are not in pari materia with the provisions as contained in the Sabah State Constitution 'the Sabah Constitution').

It is accepted that when anyone is given the absolute discretion to decide upon certain matters, it is not the function of the court to inquire as to how the person exercises his discretion on the matters and the factors he took into consideration in exercising such a discretion. See *Tun Datu Hj Mustapha bin Datu Harun v Tun Datuk Hj Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah and Datuk Joseph Pairin Kitingan (No 2)* [1986] 2 MLJ 420. The subjective determination of the person is non-justiciable. However, considering the matters contained in this application of the plaintiff as a whole, those matters involved various aspects which are not all concerning the issue of questioning the exercise of the discretion of the Yang di-Pertua Negeri Sabah given by the Sabah Constitution. Therefore, it is not correct for the court to decline to hear the originating summons wholly on the ground of lack of jurisdiction. Before any such discretion, is to be exercised by the person so given, if the statute or the Sabah Constitution imposes conditions to be satisfied before the exercise of such discretion, the fulfilling of those conditions only would clothe the person given the jurisdiction to exercise that discretion. The court, therefore, will not be without jurisdiction to consider whether the requisite conditions are being fulfilled by the person. Once these conditions are satisfied, then the court will no longer have jurisdiction to enquire as to how and what factors that person took into consideration in arriving at his decision. A good example is in regard to the provisions as contained in art 7 of the Sabah Constitution. It is as follows:

> (1) If the Chief Minister ceases to command the confidence of a majority of the members of the Legislative Assembly, then, unless at his request the Yang di-Pertua Negeri dissolves the Assembly, the Chief Minister shall tender the resignation of the members of the Cabinet.
>
> (2) A member of the Cabinet may at any time resign his office by writing under his hand addressed to the Yang di-Pertua Negeri, and a member of the Cabinet other than the Chief Minister shall vacate his office if his appointment thereto is revoked by the Yang di-Pertua Negeri acting in accordance with the advice of the Chief Minister.

A (3) Subject to clauses (1) and (2), a member of the Cabinet other than the Chief Minister shall hold office at the pleasure of the Yang di-Pertua Negeri.

Under cl (1), if the Chief Minister requests the Yang di-Pertua Negeri to dissolve the assembly but the Yang di-Pertua Negeri refuses to accede to B the request, the court cannot question the Yang di-Pertua Negeri as to why he refuses or as to what matters he took into consideration in refusing the request. This is so, because the power to withhold the consent to a request for the dissolution of the legislative assembly is exclusively given by the Sabah Constitution to the Yang di-Pertua Negeri pursuant to art 10(2)(b) of the Sabah Constitution. Under cl (2) of art 7, the Yang di-C Pertua Negeri is being given the power to revoke the appointment of a member of the Cabinet other than the Chief Minister. If a member other than the Chief Minister has his appointment revoked by the Yang di-Pertua Negeri and he asks the court to decide the issue of the revocation, alleging that it was not done in accordance with the provisions of the D Sabah Constitution, the court has the jurisdiction to enquire whether the condition required by the clause of the article of the Constitution had been complied with. However, once the court is satisfied that the condition precedent has been fulfilled, the court has no further jurisdiction to inquire as to why the Yang di-Pertua Negeri revoked the appointment of the member. The condition precedent here is that to revoke the member's E appointment, the Yang di-Pertua Negeri must act in accordance with the advice of the Chief Minister. Under cl (3), a member of the Cabinet, other than the Chief Minister, shall hold office at the pleasure of the Yang di-Pertua Negeri but subject to certain conditions to be fulfilled, and not a pleasure at large. So in this instance, the court has the jurisdiction to F enquire whether in exercising his discretion under the clause, the Yang di-Pertua Negeri has overlooked the condition precedent required by the clause. So, just that the Yang di-Pertua Negeri has a certain discretion to exercise, does not mean that ipso facto the jurisdiction of the court is ousted. While on the subject of the pleasure of the Yang di-Pertua Negeri, the learned senior federal counsel cited various Indian authorities that G Ministers hold office at the pleasure of the Governor. One such authority is *Mahabir Prasad v Prafulla Chandra* AIR 1969 Cal 198. At p 209, the learned judge said:

> Article 164(1) provides that the Ministers shall hold office during the pleasure of the Governor. This exercise of pleasure of the Governor, however, H has not been fettered by any condition or restriction. The withdrawal of the pleasure of the Governor is, in my view, a matter entirely at the discretion of the Governor. The provision in cl (2) of art 164, that the Ministers shall be collectively responsible to the legislative assembly of the State, does not in any manner fetter or restrict the Governor's power to withdraw the pleasure during which the Ministers hold office.

I Such being the case, the learned senior federal counsel says, by the first defendant appointing the second defendant and, on his advice, appointing the third to the ninth defendants based on his discretion, the first defendant was in fact withdrawing his pleasure from the plaintiff. Hence the plaintiff cannot complain for his loss of office and the court has no jurisdiction to

question the first defendant in withdrawing his pleasure. Therefore, the issue is non-justiciable. The sole judge is the first defendant and not the court. With respect, art 164(1) of the Indian Constitution is not in pari materia with art 7(3) of the Sabah Constitution. Section 164(1) thereof states that the Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, *and the Ministers shall hold office during the pleasure of the Governor*; whereas art 7(3) states that *subject to clauses (1) and (2)*, a member of the Cabinet other than the Chief Minister shall hold office at the pleasure of the Yang di-Pertua Negeri (emphasis added). So, the exercise of pleasure by the Yang di-Pertua Negeri upon the Ministers is fettered with conditions and restrictions. So, the court has the jurisdiction to enquire if the first defendant has so exercised his discretion upon the plaintiff in this case, whether he had done so subject to the fulfilment of the conditions in cll (1) and (2) of the article. Under cl (1), the discretion to withdraw his pleasure is properly exercised if the Chief Minister ceases to command the confidence of a majority of the members of the assembly and he tenders the resignation of the members of the Cabinet to the first defendant, but the plaintiff refused to vacate his office. Under cl (2), the discretion is properly exercised if the plaintiff's appointment is revoked by the first defendant acting in accordance with the advice of the Chief Minister, but the plaintiff refused to vacate his office. In this case, what we have is the fact that the Chief Minister resigned and the plaintiff's appointment was never revoked by the first defendant. So, the issue revolves round the interpretation to be given by the court to the various relevant provisions of the Sabah Constitution, particularly arts 6 and 7 thereof, which is clearly within the jurisdiction of the court. Therefore, the matter is not that plain and obvious to invoke the discretion of the court to strike out the plaintiff's originating summons summarily.

The learned senior federal counsel further submitted that Pairin resigned pursuant to art 7(1) of the Sabah Constitution. That is his version but the plaintiff contends otherwise. Under ground (a) of O 18 r 19(1) of the RHC, what is before the court is only the originating summons of the plaintiff and his affidavit in support. In the affidavit, the plaintiff merely says that on 17 March 1994, Pairin resigned as Chief Minister and, on the same day, the first defendant appointed the second defendant to replace him and, on 24 March 1994, on the advice of the second defendant, the first defendant appointed the third to the ninth defendants as Ministers and members of second defendant's Cabinet based on the petition by 30 assemblymen. By his prayer, the plaintiff seeks, inter alia, a declaration that the resignation of Pairin was under art 7(2) of the Sabah Constitution and not under cl (1) thereof. There is an issue to be tried here because if the resignation is in accordance with cl (1), the plaintiff cannot complain. It is under cl (1) if it is established that Pairin resigned on account of his ceasing to command the confidence of a majority. According the plaintiff, this is to be resolved only by a motion tabled in the assembly. The learned senior federal counsel says Pairin cannot resign under cl (2) of the article as that clause is meant only for the members and not for the Chief Minister. I cannot agree with the senior federal counsel because the

A language of the clause is clear that it includes a Chief Minister as a member of the Cabinet when dealing with resignation. The clause only excludes the Chief Minister in the case of revocation of the appointment by the Yang di-Pertua Negeri. So again, this is not a plain and obvious case for a striking out summarily of the plaintiff's originating summons.

B It is also said that the resignation of Pairin must be deemed to be the resignation of the Cabinet based on established constitutional convention. Convention comes in aid of the construction and interpretation of the constitutional provisions. However, convention cannot override the express provisions of the Sabah Constitution. So, before a convention is invoked, the constitutional provision needs to be looked at. So the matter is not C plain and simple by merely looking at the convention and brushing aside the constitutional provision. It is further submitted that the appointment of the third to the ninth defendants as Ministers means in law and in fact the dismissal of the plaintiff as a Minister. Again, this involves the argument as to the interpretation to be given to art 7 of the Sabah Constitution as to D whether in the absence of the resignation by members of the Cabinet and in the absence of revocation of their appointments, and in the absence of a clear reason for Pairin to resign, the said resignation is one under art 7(1) thereof. If the resignation of Pairin as Chief Minister was under cl (2), we cannot conclude that such resignation would result in the automatic loss of office of the members of his Cabinet simply on account of the E appointment of the third to the ninth defendants into the Cabinet of the second defendant. Again, this is an issue of law to be resolved at the trial.

In conclusion, I hold that, looking at the pleading of the plaintiff, there are various issues to be tried and, in the circumstances, the application of the defendants, under ground (a) of O 18 r 19(1), must necessarily fail. F On grounds (b) and (d) and the inherent jurisdiction of the court, the court in these proceedings is allowed to look at the evidence found in the various affidavits filed by both sides. Under this head, the court will strike out the originating summons of the plaintiff if satisfied that it is scandalous, frivolous or vexatious or that it is an abuse of the process of the court. Exhibit SS–2 to the affidavit-in-reply No 1, affirmed by Shee Hoa Sern on G behalf of all the defendants, is a letter of resignation dated 17 March 1994 from Pairin addressed to the first defendant. Below are the contents of the letter:

> 17 Mac 1994
>
> H Tuan Yang Terutama
> Yang di-Pertua Negeri Sabah
> Istana
> Kota Kinabalu
>
> Ke hadapan Majlis Tuan Yang Terutama
> Yang DiPertua Negeri Sabah
>
> I Per: Perletakan jawatan sebagai Ketua Menteri Sabah
>
> Dengan segala hormat dan takzimnya, izinkanlah saya menyampaikan hasrat dan tujuan saya meletakkan jawatan sebagai Ketua Menteri Negeri Sabah mulai dari jam 2 petang, 17 Mac 1994.

Saya juga ingin mengucapkan setinggi-tinggi penghargaan di atas kepercayaan Tuan Yang Terutama Yang DiPertua Negeri Sabah kepada saya sebagai Ketua Menteri Negeri Sabah selama ini.

Sekian, terima kasih.

Yang benar
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(Datuk Joseph Pairin Kitingan)

According to the first defendant in the affidavit-in-reply no 4 of the defendants, on 17 March 1994, Pairin, by a letter addressed to him, tendered his resignation. The letter is exhibited as TYT–5 which is also SS–2. In the exercise of his personal discretion under art 7(1) of the Sabah Constitution, he accepted the resignation as Pairin had ceased to command the confidence of the majority of the assembly. It might be so in his mind because in an earlier paragraph he said, on 16 March 1994, a petition signed by 30 members of the assembly was formally delivered to his office. However, it is to be noted that from the contents of the letter, the resignation is in respect of Pairin as the Chief Minister. It is not a letter tendering the resignation of the members of his Cabinet as provided for under art 7(1) of the Sabah Constitution. The Sabah Constitution uses the phrase 'to command the confidence of a majority of the members of' the assembly both in arts 6 and 7. One is in the context of the judgment of the Yang di-Pertua Negeri in appointing a Chief Minister and the other is in the context of a Chief Minister if he ceases to command the confidence of a majority, he is to tender the resignation of the members of his Cabinet. As regard the first, it is non-justiciable if circumstances under cl (3) of art 6 warrant it. But in relation to the second, in the light of the context of the resignation letter, it is arguable and becomes an issue in the context of art 7 of the Sabah Constitution. To my mind, this is a triable issue as to how the fact of 'ceases to command the confidence of a majority' is to be determined. There is the press statement issued by Pairin on 17 March 1994 itself, exhibited as SS–3. But that is what Pairin says after tendering his letter of resignation to the first defendant. In law, subject to certain exceptions, a written statement cannot be allowed to be varied or contradicted by an oral or other written statement. So to that extent it cannot be said that the originating summons of the plaintiff is scandalous, frivolous or vexatious or is an abuse of the process of court. Then the learned senior federal counsel says that the plaintiff lacks bona fide because he was present when Pairin made the press statement, and he did not maintain that the resignation of Pairin was purely personal to him and did not also maintain that he was still a Minister. This inaction of the plaintiff, says the senior federal counsel, amounts to an inequitable conduct on the part of the plaintiff which disentitles him to the declarations sought. I cannot agree because in the circumstances of this case, it is not so much what the plaintiff did or did not do. It is more of oral evidence against a written one. Lastly, there is also in the submission of the learned senior federal counsel that the exercise embarked by the plaintiff in his application is futile and academic as the new Chief Minister and his Cabinet had been appointed and it will create havoc if an opposition member like the

plaintiff is put in the Cabinet of the second defendant, and on that ground the action should be struck out. I think it is premature at this stage of the proceeding to consider all that. An action for a declaration involves two stages. The first is that the plaintiff must persuade the court that he has the right. If he succeeds, only then will the second stage comes into operation, ie the remedy stage. By his submission, the learned senior federal counsel was saying that the plaintiff should not be given the remedy to avoid repercussion. However, at the moment we are not even at the first stage as yet as this application of the defendants to strike out the pleading of the plaintiff constitutes a preliminary objection to the proceedings.

In the circumstances of what has been said above, it is in my considered opinion that the originating summons of the plaintiff has raised several issues both of law and facts which call for a full trial of the action. It is not a plain and obvious case whereupon if the court ought to strike out the pleadings summarily, I find that the plaintiff has a reasonable cause of action on the pleading and that it is in no way scandalous, frivolous or vexatious or otherwise an abuse of the process of the court. In the circumstances, I dismiss the application of the defendants by this summons-in-chambers with costs to the plaintiff. The hearing of the originating summons will proceed. Application dismissed with costs.

Application dismissed.

Reported by Anne Khoo